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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

IN RE COLLEGE ATHLETE NIL
LITIGATION

Case No. 4:20-cv-03919-CW

**DEFENDANTS' NOTICE OF MOTION,
MOTION AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF TO EXCLUDE
THE OPINIONS, REPORTS, AND
TESTIMONY OF EDWIN DESSER AND
DANIEL RASCHER**

Hearing Date: Sept. 21, 2023
Time: 2:30 PM
Trial Date: Jan. 27, 2025
Judge: Hon. Claudia Wilken

[REDACTED PUBLIC VERSION]

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 21, 2023 at 2:30 PM or as soon thereafter as the matter may be heard by the Court, at the courtroom of the Honorable Claudia Wilken, Courtroom 2, 4th Floor, United States District Court, 1301 Clay Street, Oakland, California, Defendants National Collegiate Athletic Association, the Atlantic Coast Conference, The Big Ten Conference, Inc., The Big 12 Conference, Inc., the Pac-12 Conference, and the Southeastern Conference, will and hereby do move the Court for an order to exclude the opinions, reports, and testimony of Edwin S. Desser and Dr. Daniel A. Rascher.

This motion is made pursuant to Federal Rule of Evidence 702, as well as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Defendants base their motion on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities and materials cited therein, the [Proposed] Order, any oral argument heard by the Court and such other matters as the Court deems proper.

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INTRODUCTION

The foundation for Plaintiffs’ motion to certify classes seeking over \$1.4 billion in damages for harm allegedly caused by NCAA rules limiting name, image, and likeness (“NIL”) payments is the opinions of Edwin S. Desser and Dr. Daniel A. Rascher. Media consultant Desser claims the “collective” value of NIL used in a sports broadcast (“BNIL”) is 10% of total broadcast revenue for each conference and concludes that this BNIL value for multi-sport media deals can be attributed 75% to football, 15% to men’s basketball, and 5% to women’s basketball. Rascher opines that in the market for student-athlete labor the NCAA would adopt Desser’s 10% valuation, and each conference would allocate that portion of its revenue to football and basketball players according to Desser’s proposed breakdown, making equal payments to student-athletes in each sport (resulting in significant differences between conference payments in each sport).

These opinions have no more substance than a house of cards. Desser’s opinion that student-athlete NIL constitutes 10% of the “value” of the media rights in broadcast agreements is simply made up. Desser points to no real world market data to support his proposed BNIL value—because there is none. He admits there is no real-world market for BNIL rights, nor any contract that places a value on it. He has never negotiated any BNIL amount. His 10% number is pure speculation, and should be excluded. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999) (“[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

Desser’s opinion “allocating” non-existent BNIL value among football, men’s basketball, and women’s basketball is also rank speculation. Broadcast agreements neither allocate revenue among sports nor provide any basis to do so. Desser cherry-picks isolated mentions of possible allocations, ignoring their context and evidence in those same documents (and innumerable others) contradicting his allocation. His allocation opinion is inadmissible. *See In re Bextra & Celebrex*

1 *Mktg. Sales Pracs. & Prod. Liab. Litig.*, 524 F. Supp. 2d 1166, 1176, 1184 (N.D. Cal. 2007) (ex-
 2 cluding testimony of expert who “cherry-pick[ed] observational studies that support his conclusion
 3 and reject[ed] or ignor[ed] the great weight of the evidence that contradicts his conclusions”).

4 Rascher’s BNIL methodology should be excluded because it rises or falls based on Des-
 5 ser’s purely speculative inputs. But regardless of how the Court rules as to Dessser, Rascher’s
 6 opinion that there are common methods for estimating antitrust impact and damages is inde-
 7 pendently without substance. Dessser offers no opinion as to the alleged BNIL value of any indi-
 8 vidual student-athlete; in fact, he admits that these values would vary greatly. Kilaru Decl. Ex. 6
 9 (Desser Tr. 54:5-55:7, 93:1-94:7). As explained below, Rascher has no basis for asserting that
 10 every scholarship athlete would receive a payment and ignores (and fails to analyze) evidence to
 11 the contrary. He then blithely asserts that competition in the market for student-athlete labor
 12 would result in all scholarship players receiving exactly the same broadcast revenue payment,
 13 regardless of talent or any other individual characteristic. That contradicts a basic principle of
 14 sports economics in general, and *his own academic work* in particular, which teaches that teams
 15 pay more for more-talented players. *See Valente v. Textron*, 931 F. Supp. 2d 409, 429 (E.D.N.Y.
 16 2013) (excluding opinion that contradicted expert’s own peer-reviewed article). His contrary
 17 opinion given for this litigation, in defiance of the consensus in his field, is inadmissible. *Wen-*
 18 *dell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) (courts may “consider
 19 whether experts are testifying ‘about matters growing naturally’ out of their own independent re-
 20 search, or if ‘they have developed their opinions expressly for purposes of testifying’”).

21 Rascher’s methodology for calculating third-party NIL damages is similarly flawed. It
 22 makes speculative assumptions about student-athlete compensation without accounting for signif-
 23 icant factors relevant to third-party NIL monetization that undermine his model’s reliability.
 24 Rascher’s opinion on third-party NIL damages is unreliable, and should be excluded.

25 BACKGROUND

26 Dessser and Rascher offer the following opinions. None withstand *Daubert* scrutiny.

Broadcast NIL. Desser purports to rely on his “experience negotiating sports broadcasting agreements” to conclude that the collective value of student-athlete BNIL is 10% of a conference’s total broadcast revenue. Expert Report of Edwin S. Desser, ECF No. 209-03, at 54 (“Desser Rpt.”). Desser has never negotiated a college sports media agreement. Desser Tr. 31:25-32:20. Nor has he separately valued NIL rights in a broadcast; it is a concept fabricated for this litigation. *Id.* 33:11-34:17. No one else has attempted to “segregate the NIL value from the value of the broadcast rights package as a whole” either. *Id.* 34:8-17. Indeed, in the real world, “subdividing the overall payment to be made in a media rights contract generally would serve no business purpose,” Desser Rpt. 6-7, and “[t]here is no separate place where the NIL rights in broadcast are bought and sold separate from the player contracts themselves,” Desser Tr. 77:6-78:15. *See also* Expert Report of Bob Thompson, at 35 (“Thompson Rpt.”). This is consistent with the conferences’ experience: “At no time during my participation in and direction of the SEC’s negotiations with networks did any consultant or any network indicate that there was any value” to the “[BNIL] rights of any student-athletes.” Sankey Decl. ¶23 (SEC Commissioner).¹ It is also consistent with the use of NIL in professional sports, for which broadcast agreements do not contemplate or result in any payment to players that directly relates to or can be traced to the use of any player’s NIL in broadcasts. *See* Suppl. Scebelo Decl. ¶4; Suppl. Arrick Decl. ¶4. In the NFL and NBA, there is no “separate portion of salary delineated in the player agreements for NIL as opposed to performance on the field.” Desser Tr. 75:18-76:7, 76:16-19, 78:8-15. Further, as explained below, Desser offers no opinion about the value of any given student-athlete’s BNIL, or about whether each scholarship student-athlete would be paid in a labor market—and thus provides no support for Rascher’s opinion that every student-athlete on a team would receive any, much less the same, payment. Desser Tr. 15:6-17:24, 23:23-24:25. His 10% opinion has no basis.

¹ *See also* Kenny Decl. ¶13 (Big 10 Senior Vice President for Television, Media Analytics and Emerging Platforms); Kliavkoff Decl. ¶27 (Pac-12 Commissioner); Weiberg Decl. ¶13 (Senior Vice President and Director of Athletics at Oklahoma State University); Rhoades Decl. ¶13 (Vice President and Director of Intercollegiate Athletics at Baylor University); Tario Decl. ¶28 (Deputy Commissioner/Chief Financial Officer, Business and Administration of the Atlantic Coast Conference).

1 Desser also purports to rely on royalty rates for NIL licenses in the promotional and en-
 2 dorsement contexts, but these have nothing to do with BNIL. Desser compares apples to oranges:
 3 the alleged value of BNIL, on one hand, and royalty payments in the non-broadcast professional
 4 sports context, including in patent, apparel, digital collectible, trading card, and video game mar-
 5 kets, on the other. *See* Desser Rpt. 55-56. As Rascher admitted, such licenses have nothing to do
 6 with BNIL. Kilaru Decl. Ex. 7 (Rascher Tr. 51:3-20).

7 Desser also lacks real-world support for his opinion that conferences would allocate the
 8 10% share of their broadcast revenues among the sports, with at least 75% going to football, at
 9 least 15% to men's basketball, and no more than 5% to women's basketball. Desser Rpt. 63. He
 10 admits that broadcasters do not allocate rights fees by sport in multi-sport agreements. Desser Tr.
 11 121:9-18. Instead, "the vast majority of the Media Rights agreements are for a combination of
 12 different sports," and "[i]n general, there is no delineation in conference or NCAA deal contracts
 13 for specific amounts to be paid to particular schools, or for particular sports or games—just a to-
 14 tal annual amount of cash to be split by the various licensors, usually in a manner of their choos-
 15 ing." Desser Rpt. 49, 60 (footnote omitted). Nor do the conferences have that information; broad-
 16 casters "do not share detailed revenue and cost information" necessary to "determine the relative
 17 contribution of each sport," nor do they include any "allocation of rights fees." Sankey Decl.
 18 ¶¶30, 33. Despite "spen[ding] a lot of time looking," Desser found very little evidence in the rec-
 19 ord of multi-sport allocations. Desser Tr. 110:22-112:2.

20 The three documents Desser relies on to support his allocation opinion do not move the
 21 needle. The first, an SEC financial statement, contradicts the allocation Desser proposes. *See*
 22 Desser Ex. 18 at 806-10. The document allocated NSC of broadcast revenues from a CBS agree-
 23 ment to football and NSC to men's basketball, and did not allocate at all over NSC in
 24 revenues from a separate agreement with ESPN related to the SEC Network. *Id.*; Sankey Decl.
 25 ¶¶31(c), 32. Desser acknowledged that this cherry-picking makes his analysis mathematically in-
 26 valid. Desser Tr. 118:23-119:12 (admitting Redacted - NSC). It is also limited to
 27 a single A5 conference—and there is no basis to believe that any allocations the SEC might
 28

1 make would hold across all A5 conferences. The second, a term sheet from a Conference USA
 2 deal in 2010, does not involve a Defendant conference and contains an incomplete allocation that
 3 Desser did not know how to interpret. *Id.* 112:3-113:4. There is no basis to believe that it reflects
 4 an allocation applicable to any A5 conference, much less all of them. The third, a 2011 agree-
 5 ment between the NCAA and ESPN, does not even propose an allocation for the sports at is-
 6 sue—football, men’s basketball, and women’s basketball. Desser Rpt. 62. Desser says only that
 7 the agreement is “consistent with my view that, at least to date, most Olympic Sports should re-
 8 ceive a very small allocation of the media revenues in college media rights deals.” *Id.* Put
 9 simply, there is no basis for Desser’s allocation.

10 Rascher’s BNIL Analysis. Rascher asserts that the relevant market is a labor market for
 11 student-athletes and concludes that, if NCAA rules permitted payments for NIL rights, every
 12 scholarship football and basketball player on every team in every A5 conference would have
 13 been paid for BNIL. Rascher ultimately contends that if BNIL payments were allowed, each con-
 14 ference would provide “an equal Broadcast NIL payment to each class member [i.e., every schol-
 15 arship football and basketball player] in each sport within each conference.” Rascher Rpt. ¶163.

16 Desser affords no basis for Rascher to conclude that every scholarship athlete would be
 17 paid, or that they would be paid equal amounts, because Desser offers no opinion on these topics.
 18 Rascher admits he is not assuming that any conference or NCAA rule would require such pay-
 19 ments. Rascher Tr. 120:7-17. Rascher bases these crucial conclusions in his BNIL model solely
 20 on his own conclusion that market forces would produce this outcome. He disclaimed any reli-
 21 ance on NFL or NBA compensation structures. Rascher Tr. 166:25-167:6. He also does not ex-
 22 plain why the NCAA would limit amounts to be paid in the labor market based on Desser’s theo-
 23 retical value of BNIL media rights in an unrelated market. Rascher Rpt. ¶¶159-67.

24 Third-Party NIL. To predict what income student-athletes would have made in third-party
 25 NIL deals before July 1, 2021, Rascher sketches out a “before and after” approach that uses a
 26 student-athlete’s *current* and *self-reported* performance in the NIL market to predict perfor-
 27 mance in prior years. *Id.* ¶¶185-87, 196-97. Rascher assumes that student-athletes who reported
 28

LEGAL STANDARD

An expert may only testify about issues within his expertise and experience. *Kumho*, 526 U.S. at 149. Where an expert invokes their “expertise” in lieu of real-world data, the Court may “consider whether [they] are testifying ‘about matters growing naturally’ out of their own independent research, or if ‘they have developed their opinions expressly for purposes of testifying.’”

1 *Wendell*, 858 F.3d at 1232. An expert opinion that relies on “vague, undisclosed general experi-
 2 ence” unsupported by the record or real-world data should be excluded. *Digital Reg of Tex., LLC*
 3 *v. Adobe Sys., Inc.*, 2014 WL 4090550, at *2 (N.D. Cal. Aug. 19, 2014). “[N]othing in either
 4 *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that
 5 is connected to existing data only by the *ipse dixit* of the expert.” *Kumho*, 526 U.S. at 157 (1999)
 6 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

7 **ARGUMENT**

8 **I. Desser’s Opinions Do Not Satisfy *Daubert* Or Rule 702.**

9 Despite having never negotiated a college sports media agreement or attempted to value
 10 BNIL in any media agreement, Desser Tr. 31:25-34:17, Desser proposes two key inputs regarding
 11 the value and allocation of student-athlete BNIL for Rascher’s BNIL methodology. Both opinions
 12 are unreliable, speculative, and lack real-world support.

13 **A. Desser’s Opinion That BNIL Represents 10% Of The Value Of Broadcast** 14 **Media Rights Should Be Excluded.**

15 All expert testimony must have a “traceable, analytical basis in objective fact.” *Bragdon v.*
 16 *Abbott*, 524 U.S. 624, 653 (1998). The fundamental defect in Desser’s opinion is that there is no
 17 such factual basis, because there is no real-world market for standalone BNIL. Plaintiffs cannot
 18 identify anyone who has ever valued BNIL in the real world. Opp. 7-9, 23-24. Desser even admits
 19 that there is “not a particular business purpose” to do so. Desser Tr. 34:13-17; *see also* Desser Rpt.
 20 6-7. Where athlete NIL rights are addressed in other contexts, such as professional sports contracts
 21 where players agree not to contest the use of their image, they are addressed contractually in a
 22 labor market that compensates the athlete not for NIL, but for athletic services in amounts varying
 23 widely by player. *See* Desser Tr. 62:1-14, 63:5-10; Rascher Tr. 83:3-12. Desser offers no real-
 24 world examples of BNIL value that led him to pick 10% instead of 5%, 40%, 0% or some other
 25 number for valuing the “athlete value of NIL” in a broadcast agreement. The proposed 10% valu-
 26 ation is pure *ipse dixit*.

27 Although nobody—including Desser—does or would value BNIL outside of this litigation,
 28 Desser claims his “experience” provides a sufficient basis for his opinion. *See* Desser Rpt. 53-54.

1 But an expert does not satisfy Rule 702 by picking a number based on “experience” and asking
 2 the Court to take his word for it. An expert witness who “is relying solely or primarily on experi-
 3 ence . . . must explain how that experience leads to the conclusion reached, why that experience is
 4 a sufficient basis for the opinion, and how that experience is reliably applied to the facts.” Fed. R.
 5 Evid. 702, 2000 Adv. Comm. Note. Desser does none of this.

6 “[R]eliability becomes more, not less, important when the ‘experience-based’ expert opin-
 7 ion is perhaps not subject to routine testing, error rate, or peer review type analysis.” *United States*
 8 *v. Valencia-Lopez*, 971 F.3d 891, 898 (9th Cir. 2020). Courts have not hesitated to exclude “expe-
 9 riential” opinions untethered to a reliable methodology. In one case, an expert employed reasoning
 10 almost identical to Desser in asserting that a reasonable royalty for certain technology was \$1 per
 11 unit. *GPNE Corp. v. Apple, Inc.*, 2014 WL 1494247, at *4 (N.D. Cal. Apr. 16, 2014) (relying on
 12 “30 years of experience in the licensing world and the valuation of intellectual property and [his]
 13 hundreds of transactions” but conceding that “there’s no specific math”). Judge Koh deemed this
 14 opinion an “impermissible black box” without “sound economic and factual predicates.” *Id.* at *4-
 15 5. As she explained, “30 years of experience” cannot be tested or “subjected to peer review and
 16 publication” and there was no “known or potential rate of error” in the analysis, so the “analytical
 17 gap” between the data and the royalty figure was “simply too great.” *Id.* (quoting *Joiner*, 522 U.S.
 18 at 146). In a similar case, the expert’s opinion was excluded when he “decided to adopt a fifty-
 19 percent starting point” for a reasonable royalty rate “based on his vague, undisclosed general ex-
 20 perience.” *Digital Reg*, 2014 WL 4090550, at *2.² The same principles apply here.

21
 22
 23
 24 ² See also, e.g., *Open Text S.A. v. Box, Inc.*, 2015 WL 349197, at *6 (N.D. Cal. Jan. 23, 2015)
 25 (“Rather than spelling out the steps she took to go from the data to the royalty rate opinion, Holt
 26 cites her ‘experience’—an abstraction not visible to the eyes of the Court, the jury, and opposing
 27 counsel, or testable in the crucible of cross-examination.”); *Lawrence v. Raymond Corp.*, 2011
 28 WL 3418324, at *7 (N.D. Ohio Aug. 4, 2011) (excluding an expert’s method because it is a “black
 box into which data is fed at one end and from which an answer emerges at the other”), *aff’d*, 501
 F. App’x 515 (6th Cir. 2012); *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 418 (7th
 Cir. 2005) (projections based on “industry expertise” or “awareness” show that the expert “either
 had no method or could not describe one. He was relying on intuition, which won’t do.”).

1 Nor can Desser excuse his failure to provide any parameters under which his BNIL valua-
 2 tion may be tested, verified, or meaningfully examined by declaring that his assumptions in apply-
 3 ing his “experience” are “conservative.” *Looksmart Grp., Inc. v. Microsoft Corp.*, 2019 WL
 4 4009263, at *5 (N.D. Cal. Aug. 5, 2019); *see also LinkCo, Inc. v. Fujitsu Ltd.*, 2002 WL 1585551,
 5 at *4 (S.D.N.Y. July 16, 2002) (excluding opinion when expert asserted, without explanation, that
 6 he was using a “very conservative view”).

7 Desser also cannot save his opinions by saying that Rascher’s analysis “confirms [Des-
 8 ser’s] opinion that 10% is a conservative and reasonable estimate of [BNIL] value.” Desser Rpt.
 9 54. As Desser admitted at his deposition, he never even read Rascher’s report. Desser Tr. 24:12-
 10 17. In any event, Rascher’s report states that Rascher is relying on *Desser* to determine “the value
 11 of the Broadcast NILs of the athletes”—not the other way around. Rascher Rpt. ¶170.

12 Desser also lacks credibility in claiming that his 10% valuation is supported by patent li-
 13 censes and agreements with professional leagues or players’ associations for *licensed merchan-*
 14 *dise*, each with widely varying rates. Desser Rpt. 55-56. He does not explain why royalties for
 15 physical goods like a jersey with a team and player name, or patent licenses from various indus-
 16 tries, are the same or even comparable to a royalty for student-athlete NIL in a television broadcast.
 17 When an expert analogizes to existing license agreements to estimate a hypothetical royalty rate,
 18 “there must be a basis in fact to associate the royalty rates used in prior licenses to the particular
 19 hypothetical negotiation at issue in the case.” *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292,
 20 1317 (Fed. Cir. 2011); *see also Goodness Films, LLC v. TV One, LLC*, 2014 WL 12780291, at *2
 21 (C.D. Cal. May 19, 2014) (excluding expert opinion based on “experience in the movie business”
 22 where expert did not “identif[y] relevant, similar comparisons on which to base his screen credit
 23 valuation”).³ The expert “must provide a jury enough information to ‘evaluat[e] the probative
 24 value of those agreements,’ lest the jury be given ‘little more than a recitation of royalty numbers.’”
 25 *Apple, Inc. v. Samsung Elecs. Co.*, 2014 WL 794328, at *8 (N.D. Cal. Feb. 25, 2014).

26
 27 ³ *See also LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 79 (Fed. Cir. 2012)
 28 (“When relying on licenses to prove a reasonable royalty, alleging a loose or vague comparabil-
 ity between different technologies or licenses does not suffice.”).

1 Actual negotiations for commercial use of NIL in *non*-broadcast products cannot be likened
 2 to non-existent BNIL negotiations. As Desser admits, the licensing agreements he cites are for
 3 fundamentally different rights and products than a television sports broadcast: apparel, digital col-
 4 lectible, trading card, video games, and a variety of patents. Desser Rpt. 55-59. They are not suf-
 5 ficiently comparable to provide a reliable basis for estimating a “broadcast NIL” license that has
 6 never existed, *see Uniloc*, 632 F.3d at 1317, especially given Desser’s admission that broadcast
 7 agreements, in contrast to his comparators, never include amounts dedicated as “payment for NIL.”
 8 Opp. 2, 8-9.

9 In addition, the professional contracts Desser relies on provide no support for his opinion.
 10 *See* Desser Rep. 52. The NFL and NBA collective bargaining agreements and form player con-
 11 tracts negotiated by professional athlete unions state that the players do not contest the right of the
 12 leagues to broadcast games. Suppl. Scebelo Decl. ¶¶2-3, Ex. A; Suppl. Arrick Decl. ¶¶2-4, Ex. A.
 13 These agreements establish compensation limits for all players based on shares of various sources
 14 of revenue, but players negotiate their own individual salaries, which vary widely in amounts. *Id.*
 15 Nothing in this structure supports Desser’s 10% valuation. The unions, through collective bargain-
 16 ing, also have authority to enter into NIL endorsement deals for products on behalf of groups of
 17 players, with the vast majority of the proceeds allocated to individual players, *e.g.*, Suppl. Scebelo
 18 Decl. ¶¶10-12, but products have no relationship to broadcast rights, so these deals offer no support
 19 to Desser either. Professional athletic apparel and collectible royalties are not meaningful compar-
 20 ators. *See Uniloc*, 632 F.3d at 1316-17 (“[T]he district court must consider licenses that are com-
 21 mensurate with what the defendant has appropriated. If not, a prevailing plaintiff would be free to
 22 inflate the reasonable royalty analysis with conveniently selected licenses[.]”) (quoting
 23 *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 872 (Fed. Cir. 2010)) (cleaned up).

24 Desser’s opinion is inadmissible for the independent reason that he does not use these other
 25 royalty rates as inputs into a reliable model to estimate an appropriate rate. Nor does he disclose
 26 the weight (if any) he gave particular agreements, or why. Desser offers no opinion on the value
 27 of any individual person’s alleged BNIL value, Desser Tr. at 22:25-24:11 (confirming that he is
 28

Counsel Only

providing an overall collective estimate applicable to no individual), and reports only
 Counsel Only for the licenses he relies on, masking a considerable degree of variation, *see, e.g.*,
 Rascher Rpt. ¶172. In other words, Desser looks at widely varying royalty rates and simply de-
 clares that they support his opinion that, in his “experience,” a 10% rate is appropriate. That is
 plainly insufficient. *See ResQNet.com*, 594 F.3d at 870 (rejecting expert who recommended a rate
 for his hypothetical negotiation “somewhere in the middle” of the rates he relied on); *Bextra*, 524
 F. Supp. 2d at 1176 (excluding expert who “reache[d] his opinion by first identifying his conclu-
 sion . . . and then cherry-picking observational studies that support his conclusion”).

Desser’s opinion should be excluded under *Daubert* and its progeny.

**B. Desser’s Opinion As To The Allocation Of Rights Payments Among Football
 And Men’s And Women’s Basketball Should Be Excluded.**

Desser’s opinions on how to allocate his 10% figure among sports should also be excluded.
 Here, he again relies on his “experience,” without explaining how to weigh the variables he iden-
 tifies or why he picked a 75/15/5 split. As Judge Koh put it in *GPNE*, a valuation that “appears to
 have been plucked out of thin air based on vague qualitative notions of the relative importance” of
 certain inputs does not satisfy *Daubert* and should be excluded. 2014 WL 1494247, at *6. Desser
 also acknowledged that he does not rely on ratings information to support his conclusions because
 of insufficient data. Desser Tr. 122:24-123:13.

The evidence shows that broadcast revenue is almost never allocated among sports, let
 alone in a consistent ratio across conferences. Desser’s “experience” agrees: he concedes that “the
 vast majority of the Media Rights agreements are for a combination of different sports” and that
 “[i]n general, there is no delineation in conference or NCAA deal contracts for specific amounts
 to be paid to particular schools, or for particular sports or games—just a total annual amount of
 cash to be split by the various licensors, usually in a manner of their choosing.” Desser Rpt. 49,
 60.

Likewise, the evidence shows that any allocations would have to be conference specific
 and revised annually. The popularity of sports varies from school to school and conference to

conference. Tucker Rpt. ¶¶154, 296; Kenny Decl. ¶14. Some conferences have agreements authorizing broadcasts of a relatively larger proportion of football and men's basketball games. Thompson Rpt. 18. Others prioritize sports disregarded by Rascher's allocation. College hockey, for example, is popular in the North; four colleges in Boston compete annually in the Beanpot tournament broadcast from a sold-out professional arena, while most Division 1 schools do not have varsity hockey teams at all.⁴ Some conferences negotiate agreements requiring networks to incur the cost to produce and broadcast less popular games to maximize exposure for student-athletes who participate in sports that are unprofitable to broadcast. *Id.* 16-17, 48-49; Tario Decl. ¶30 (“[C]onferences may accept lower fees or other concessions to ensure that less popular Members and sports receive television exposure.”); Sankey Decl. ¶¶26-27. This variance in structure across the conferences' broadcast contracts leaves no basis to infer that *every conference* would identically allocate 10% of broadcast revenues 75%-15%-5% amongst the Football, Men's and Women's Basketball Classes respectively.

Indeed, Dessser's proposed allocation rests on a precarious foundation. Only one even relates to an A5 conference (the SEC), and the other two are over a decade old. *See supra* at 4-5. Given the variability among conferences, it is illogical for Dessser to extrapolate a common allocation based on these flimsy data points, which are not even probative for the SEC, much less the other A5 conferences for which he offers no supporting data. Moreover, in the past ten years, the relative popularity of sports school to school and conference to conference has changed, especially for women's sports. Efforts by conferences to fashion media rights agreements in a manner that enhances and grows the popularity of women's sports have resulted in increased popularity for women's sports, causing broadcasters to adjust their programming schedules and priorities accordingly. *See* Sankey Decl. ¶27; *accord* Tario Decl. ¶31. Dessser fails to account for these changes, rendering his proposed allocation unreliable.

⁴*See* Joshua Seguin, *Beanpot Shootout: How Did We Get Here*, College Hockey News (Feb. 14, 2023), https://www.collegehockeynews.com/news/2023/02/14_Beanpot-Shootout-How-Did.php; *Division I Teams and Conferences*, College Hockey Inc., <https://collegehockeyinc.com/teams-and-conferences.php> (last visited Apr. 25, 2023).

Moreover, in the process of cherry-picking isolated numbers from those documents, Desser ignores evidence that contradicts his proposed 75/15/5 allocation. For example, Desser focuses on a note in an SEC financial statement attributing an amount equal to NSC of certain rights fees received under one of the SEC's three media agreements to football. Desser Rpt. 60; Desser Ex. 18 at 807. But the same financial statement allocated NSC of broadcast revenues from a CBS agreement to football and NSC to men's basketball, and did not allocate at all over NSC in revenues from a separate agreement with ESPN related to the SEC Network. *See id.* at SEC-HOUSE0047806-10; Sankey Decl. ¶31(a), (c). When asked about the additional NSC in unallocated revenue he overlooked, Desser agreed that the amount could Redacted - NSC depending on how it was distributed. Desser Tr. 118:23-119:12. Put simply, Desser ignored two separate data points in the same document that are fatally inconsistent with his opinion. Desser's cherry-picking of selective figures from the SEC financial statement makes his opinions unreliable. *See Bextra*, 524 F. Supp. 2d at 1176 (excluding expert for "cherry-picking observational studies that support his conclusion and rejecting or ignoring the great weight of the evidence that contradicts his conclusion"); *Rearden LLC v. Walt Disney Co.*, 2021 WL 6882227, at *7 (N.D. Cal. July 12, 2021) (excluding expert who only selected data "that she believed supported the conclusion she wanted to reach"); *Republican Party of New Mexico v. Balderas*, 2021 WL 5578869, at *3 (D.N.M. Nov. 30, 2021) (an expert "cannot 'cherry pick[]' favorable data . . . but ignore[] a significant quantity of other important facts"); *Am. Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1041 (N.D. Cal. 2001) (excluding damages model that "contain[ed] entirely too many assumptions and simplifications that are not supported by real-world evidence").

II. Rascher's Opinions Do Not Satisfy *Daubert* Or Rule 702.

Rascher purports to show that Plaintiffs can establish antitrust impact and damages through common evidence, using models that lack factual support and fail to comport with rational economic behavior. The Court should strike Rascher's opinions.⁵

A. Rascher's Broadcast NIL Model Relies On Speculative And Unsupported Inputs

At the threshold, Rascher's BNIL model fails because, as Rascher admits, it relies on Dessser's speculative and unsupported conclusion that the collective value of the athletes' BNIL is approximately 10% of the value of the conferences' respective media agreements. Rascher Rpt. ¶170. Further, Dessser's testimony would not support Rascher's ultimate conclusion even if it were admissible; Dessser provides no support for Rascher's conclusions that every scholarship football and basketball player on every A5 team would have been paid—and would have been paid the same amount as every other scholarship athlete on the team in the labor market. Rascher's ultimate opinions are based on Dessser's inadmissible *and* irrelevant testimony, which Rascher cannot save.

Rascher claims to have verified that the reasoning underlying Dessser's report is "reasonable and reliable." *Id.* However, Rascher does not justify that conclusion. The minimal analysis Rascher does here suffers from the same flaws as Dessser. Rascher too attempts to defend the 10% valuation in reliance on licensing agreements with players' associations for licensed merchandise such as Redacted - Counsel Only *Id.* ¶¶171-73. By Rascher's own admission, those licenses are not for BNIL, Rascher Tr. 51:3-15, and therefore are not only improper comparators to student-athlete BNIL, *see supra* Section I.A, but they also demonstrate a wide degree of variance—from Counsel Only percent, Rascher Rpt. ¶172. This confirms that Dessser's 10% valuation is nothing more than *ipse dixit*, *see Kumho*, 526 U.S. at 157, and Rascher's reliance on it is improper.

Likewise, Rascher purports to confirm Dessser's allocation among the sports by analyzing unrelated information: NCAA MFRS data about booster donations and total revenues for football and basketball at the aggregate level for all A5 conference schools. Rascher Rpt. ¶176. This data

⁵ Defendants' class certification brief demonstrates why, regardless of whether the Court excludes Rascher's opinions under Rule 702, those opinions are insufficient under Rule 23. *See* Opp. 21-37.

1 says nothing about the proper allocation of any conference's broadcast revenue among sports. And
 2 in any event, it does not support a 75/15/5 allocation of *any* revenue for *any* conference, instead
 3 showing widely varying results from school to school and conference to conference. *Id.* Ex. 8.

4 Because Desser's opinions are speculative, and in any event do not provide a sufficient
 5 foundation for Rascher's conclusions, all of Rascher's BNIL opinions are also inadmissible.

6 **B. Rascher Used No Economic Model—Much Less A Reliable One—To Assess**
 7 **Broadcast NIL Injury And Damages.**

8 Expert evidence is reliable “if the principles and methodology used by the expert proffering
 9 it are grounded in the methods of science.” *Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 605
 10 (9th Cir. 2002). Thus, an “economic expert should employ economic theory that has been subject
 11 to peer review and is generally accepted within the field of economics.” Phillip E. Areeda & Her-
 12 bert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles & Their Application* ¶399 (4th
 13 ed. 2016). If an economist does not meet these standards, his opinions should be “deemed inad-
 14 missible.” *Id.*

15 With no support from Desser for his assertion that every scholarship student-athlete on a
 16 football or basketball team would be paid, much less equally, Rascher reverts to economic theory.
 17 But his opinion is inconsistent with economic theory—including his own. An economic expert
 18 must assume “the existence of rational economic behavior in the hypothetical free market.” *Dol-*
 19 *phin Tours v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1511-12 (9th Cir. 1985). Rascher admits
 20 that he needs to “assume that the market participants are engaging in rational economic behavior.”
 21 Rascher Tr. 32:6-10. But he offers no support for his conclusory assertion that the least talented
 22 scholarship athletes would receive BNIL revenue payments on top of their scholarships. Rascher
 23 admits that walk-ons have a “position in the labor market as being” one where “they’re not able to
 24 get a scholarship,” and therefore would not receive BNIL payments either, despite appearing on
 25 broadcasts. *Id.* 80:14-81:22. There is no reason to assume all scholarship athletes have sufficient
 26 value in the labor market to receive BNIL payments—every dollar of which reduces the BNIL
 27 available to pay star athletes. Tucker Rpt. ¶¶91-110. Nor is there support for Rascher's contention
 28 that conferences would make *equal* BNIL payments to all scholarship student-athletes in a sport,

1 despite wide variation in talent and marketability. Opp. 9-14, 24-25, 31-33; Tucker Rpt. ¶¶91-110.
 2 His conclusions are not only unsupported, they presume *irrational* economic behavior. As a result,
 3 Rascher's opinion is unreliable and should be excluded. *Apotex, Inc. v. Cephalon, Inc.*, 321 F.R.D.
 4 220, 237 (E.D. Pa. 2017) (excluding expert's damages model which "require[d] assuming away
 5 rational economic behavior by competitors").

6 That is particularly so because it is well accepted in sports labor economics that payments
 7 vary based on talent and are distributed unequally.⁶ In economic terms, there is an equilibrium
 8 price per unit of talent, not per athlete. Rascher has offered this exact opinion in his academic
 9 work. See D. Rascher, A MODEL OF A PROFESSIONAL SPORTS LEAGUE, *International Advances in*
 10 *the Economic Research*, at 14 (1997) ("There would be one wage per unit of talent where the
 11 market labor demand curve crossed the market labor supply curve."). The other works Rascher
 12 cites in his report do so as well. See Rascher Rpt. ¶141 n.156; Tucker Rpt. ¶98. Real-world evi-
 13 dence reflects these market dynamics: where they are permitted to do so—that is, in equivalency
 14 sports—schools *already* provide partial scholarships in varying amounts based on talent. *E.g.*,
 15 Tucker Rpt. ¶119 (noting that North Carolina State University provided no scholarships to Conf. of
 16 its women's soccer players, with the rest of the players receiving widely varying amounts, from
 17 Confidential of a full grant-in-aid). Rascher recognizes a similar phenomenon with walk-ons, who
 18 are "not able to get a scholarship" at all. Rascher Tr. 81:18-22.

19 Rascher's assumption that each conference will independently decide to pay 10% of its
 20 broadcast revenue to recruit student-athletes also departs sharply from economic rationality.
 21 Broadcast revenue is not equal across conferences. Thus, Rascher's methodology implies that con-
 22 ferences would pay drastically different amounts to student-athletes in the same sport. For instance,
 23 Rascher concludes that in 2020 NSC would have paid each football player \$25,700, while the
 24 NSC would have paid \$46,000. Rascher Rpt. Ex. 12. This proposal would put NSC at a
 25

26 ⁶ For example, the seminal article in sports economics, cited by Dr. Rascher himself, dealt with
 27 baseball and explained that in a free market for players, all teams would "bid for talent"; a team
 28 "will be prepared to pay a Babe Ruth a fabulous salary, simply because there are no very good
 substitutes for him, and he is worth so much more to the team than any other player." Simon
 Rottenberg, *The Baseball Players' Labor Market*, 64 J. Pol. Econ. 242, 252 (1956).

significant recruiting disadvantage. Setting prices without considering the amounts competitors pay is not rational economic behavior, rendering Rascher's model inadmissible. *Cf. Dolphin Tours*, 773 F.2d at 1511 (economic model must include "rational price differential").

Rascher's opinion that all student-athletes in a given sport and conference would receive equal payments in the amounts he predicts does not "grow[] naturally out of [his] independent research," but contradicts it and other sports economics literature. *Wendell*, 858 F.3d at 1232. His opinion is therefore inadmissible. *See id.*; *Kumho*, 526 U.S. at 152 (*Daubert's* purpose is to ensure that "an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.").⁷

C. Rascher's BNIL Damages Opinion Is Unreliable Because He Fails To Consider Title IX And State Laws.

As discussed in the Class Certification Opposition Brief, Rascher's assumption that universities and conferences would not take Title IX and diversity and equity concerns into account in providing NIL payments make his but-for world impossible. Opp. 3, 15-16, 28-29. An economic analysis cannot ignore laws that affect the marketplace. *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 267-68 (3d. Cir. 1998). Similarly, he failed to take into account state laws that prohibit conferences and institutions from paying student-athletes for their NIL rights. Rascher Tr. 111:22-112:25; Areeda & Hovenkamp ¶338(b) ("[A] plaintiff cannot be injured in fact by private conduct excluding it from the market when a statute prevents the plaintiff from

⁷ See also *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 593 F. Supp. 2d 549, 563 (S.D.N.Y. 2008) (an expert must be "as careful as he would be in his regular professional work outside of paid litigation consulting"); *Valente*, 931 F. Supp. 2d at 429 (excluding expert testimony because the expert's opinion was contradicted by his own peer reviewed article); *Avendt v. Covidien Inc.*, 262 F. Supp. 3d 493, 522-24 (E.D. Mich. 2017) (excluding an expert's opinion where the expert repeatedly expressed a contrary view in a number of peer-reviewed articles and opinions); *In re Zolofit (Sertraline Hydrochloride) Prods. Liab. Litig.*, 26 F. Supp. 3d 449, 460-61, 465 (E.D. Pa. 2014) (excluding expert whose testimony contradicted her own peer-reviewed publications, finding that her change of opinion was "not grounded in generally accepted scientific methods"); *ChampionsWorld, LLC v. U.S. Soccer Fed'n, Inc.*, 890 F. Supp. 2d 912, 948, 949 (N.D. Ill. 2012) (excluding sports economist's market definition contradicted by his own book).

entering that market in any event.”). Institutions following these state laws have state action immunity to antitrust law. *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008) (“[O]nce we determine that a restraint is unilaterally imposed by the state as sovereign, *Parker* immunity applies without further inquiry.”). It is true that, in the period prior to July 1, 2021, the state laws did not exist—but neither did the NCAA interim policy permitting third-party NIL payments to student-athletes, to which the state laws were a direct response. An economist “may not ignore . . . likely changes in the market” that would result from the response of others to the change being modeled. *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1125 (E.D. Cal. 2002) (cannot ignore entry of other athletes and reaction of sponsors to change in eligibility rules).

D. Rascher’s Third-Party NIL Damages Analysis Is Unreliable

The Court should exclude Rascher’s third-party NIL damages predictions. Rascher has not developed a model for these damages, but rather simply assumes the annual value of an athlete’s NIL deals in the period before June 30, 2021 would equal the annual value of deals they entered into after July 1, 2021, and speculates about a few adjustments he might make. Those few adjustments are an oversimplification of the myriad factors relevant to third-party NIL monetization. As discussed in detail in the Class Certification Opposition Brief (Opp. 20, 34-36), Rascher fails to consider significant factors that may differ between the before and after periods and that vary by sport, conference, and student-athlete. Instead, he assumes that NIL value in the marketplace is the same every year, such that post-July 1, 2021 reported NIL deal value is perfectly predictive of the NIL deal value every student-athlete would have achieved in the before period. In so doing, Rascher impermissibly fails to “take into account nonconspiratorial factors that would have caused prices to be different in the conspiracy period even if there had been no conspiracy.” *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 974 (C.D. Cal. 2012) (quoting *Areeda & Hovenkamp* ¶399c, p. 446).⁸

⁸ See also *Oculu, LLC v. Oculus VR, Inc.*, 2015 WL 3619204, at *21 (C.D. Cal. June 8, 2015) (excluding expert opinion that failed to analyze alternative causes of harm); *Colony Holdings, Inc. v. Texaco Refining & Mktg., Inc.*, 2001 WL 1398403, at *4 (C.D. Cal. Oct. 29, 2001) (explaining that a “report’s failure to address other potential causes of the [damage] raises questions

For example, Rascher fails to account for how the variability of student-athlete popularity over time affects third-party NIL compensation. This oversight leads to absurd results. Grant House testified that his public exposure increased significantly during the Pan American Games in 2019 and that he “would have received NIL deals” during that period had NCAA rules permitted them. House Tr. 226:1-227:15. Yet Rascher’s methodology would not reflect such a bump in NIL value based on House’s temporarily increased exposure in 2019. Individual athletes would make varying claims for compensation in individual cases based on their own unique circumstances. Rascher simply assumes that post-July 1, 2021 reported NIL deal value is perfectly predictive of the before period, despite admitting that public attention is scarce and that capturing public attention—thereby generating NIL value—is rare. Rascher Tr. 233:12-234:6.

Second, Rascher’s methodology fails to account for the effect of variability in an athlete’s overall performance over time. Stetson Bennett, for example, was a walk-on at Georgia and did not play in 2017.⁹ He transferred to junior college in 2018, returned and won the starting QB job in 2021¹⁰ and led Georgia to national championship wins in 2022 and 2023.¹¹ Bennett’s NIL value undoubtedly increased over time. But because of Rascher’s methodology, Bennett would secure damages during the before period, when he was largely unknown. Members of the 2017-18 Loyola University men’s basketball team, on the other hand, would not benefit from the heightened NIL value they would have achieved based on their Cinderella run in the 2018 NCAA Tournament.¹²

regarding the thoroughness and objectivity of the process”); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056 (8th Cir. 2000) (excluding expert’s model that rested on theory, “ignored inconvenient evidence” and “failed to account for market events that both sides agreed were not related to any anticompetitive conduct”).

⁹ Mark Schlabach, *How Georgia’s Stetson Bennett Went from Walk-On to College Football Playoff National Championship*, ESPN (Jan. 8, 2022), https://www.espn.com/college-football/story/_/id/33016492/how-georgia-stetson-bennett-went-walk-college-football-playoff-national-championship.

¹⁰ *Id.*

¹¹ William E. Ricks, *Georgia Becomes Latest Team To Win Consecutive College Football National Championships*, ESPN (Jan. 10, 2023), https://www.espn.com/college-football/story/_/id/35393996/college-football-teams-consecutive-national-titles.

¹² Chip Patterson, *March Madness 2018: Loyola-Chicago’s Cinderella Run Continues On to the Final Four*, CBS Sports (Mar. 24, 2018), <https://www.cbssports.com/college-basketball/news/march-madness-2018-loyola-chicagos-cinderella-run-continues-on-to-the-final-four/>.

Rascher’s methodology would compensate them for third-party NIL deals in later years, when they did not garner significant national attention. Rascher Tr. 259:22-261:8.

Third, Rascher also fails to consider differences in the buyer side of the market pre- and post-July 1, 2021 at all. For example, he fails to account for how changes in technology have affected third-party NIL compensation. In their Consolidated Amended Complaint, Plaintiffs note that “[h]undreds of student-athletes” currently receive third-party NIL compensation through the video-service platform Cameo and that “more than 4,000 student-athletes” are compensated by “Yoke Gaming, an app . . . that allows fans to pay to play video games with college and professional athletes.” Am. Compl. ¶25. Per Rascher, athletes who made money off of Cameo during the after period would be provided the same compensation as far back as 2016, despite the fact that (1) Cameo was founded in 2017 and (2) Cameo’s popularity—and therefore its viability as a source of revenue for SAs—did not spike until the Covid-19 pandemic. Tucker Rpt. ¶206. Rascher would also provide the same compensation as far back as 2016 to athletes who made money off of Yoke Gaming, even though Yoke was not launched until 2020.¹³ Rascher does not control for these obvious factors that would affect student-athletes’ third-party NIL compensation. *See Live Concert*, 863 F. Supp. 2d at 980 (excluding expert who failed to account for “the emergence of digitally-available music on the Internet” in his analysis of ticket prices).

Rascher’s third-party damages methodology does not account for factors likely to create meaningful differences in NIL value in the before and after periods. His model is inconsistent with economic reality and thus inadmissible under Rule 702 and *Daubert*. *See id.* at 974.

CONCLUSION

For the foregoing reasons, both Desser and Rascher’s opinions should be excluded.

Dated: April 28, 2023

¹³ Yoke Gaming, *About*, <https://www.yoketeam.com/about-us> (last visited Apr. 25, 2023).

FILER'S ATTESTATION

I, Rakesh Kilaru, am the ECF user whose identification and password are being used to file DEFENDANTS' NOTICE OF MOTION, MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF TO EXCLUDE THE OPINIONS, REPORTS, AND TESTIMONY OF EDWIN DESSER AND DANIEL RASCHER. In compliance with Local Rule 5-1(h)(3), I hereby attest that all signatories hereto concur in this filing.

/s/ Rakesh Kilaru

1 Dated: April 28, 2023

Respectfully Submitted,

2 **WILKINSON STEKLOFF LLP**

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